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# Appeal Decision

**by Susan Doran BA Hons MIPROW**

**an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 18 June 2015**

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## **Appeal Ref: FPS/W2275/14A/13**

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Kent County Council not to make an Order under Section 53(2) of that Act.
- The Application dated 28 September 2012 was refused by Kent County Council on 31 October 2014.
- The Appellant claims that the appeal route from Longbeech Park to 2 Tree Tops, Canterbury Road, Charing should be added to the definitive map and statement for the area as a footpath.

## **Summary of Decision: The appeal is allowed**

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### **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act").
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.

### **Main issues**

3. The application was made under Section 53(2) of the 1981 Act, which requires a surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
4. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made following the discovery of evidence which, when considered with all other relevant evidence available to them, shows "that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...". The case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* held that this involves two tests:

**Test A.** Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

**Test B.** Is it reasonable to allege on the balance of probabilities that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then I must conclude that it is reasonable to allege that one does subsist.

5. The standard of proof for the 'subsists' test is the balance of probabilities. The meaning of 'reasonably alleged to subsist' in cases based on user evidence was clarified in the case of *R v Secretary of State for Wales, ex parte Emery [1998]*. In his judgment Lord Justice Roch stated: *Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under Section 31 [of the Highways Act 1980], then the allegation that the right of way subsists is reasonable, and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication.*
6. For the purposes of this appeal therefore, I need only be satisfied that the evidence meets the reasonably alleged test, test B (paragraph 4).
7. The application relies on claimed use by the public. The user evidence must be considered against the requirements of Section 31(1) of the Highways Act 1980 ("the 1980 Act") which provides that "*Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it*" and Section 31(2), that "*The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice ... or otherwise*".
8. If Section 31 of the 1980 Act is inapplicable, then the question of dedication must also be examined in the context of common law. At common law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, stealth or permission). However, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.
9. There is some documentary evidence to consider. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

## **Reasons**

10. The appeal route runs from the access road to Longbeech Park in a westerly direction parallel with the A252, Canterbury Road, turning slightly south into the woodland and running behind a hedge, crossing two woodland access tracks, to join the pavement near 2 Tree Tops.

### **Documentary evidence**

11. A range of historical sources were researched by Kent County Council ('the Council'). However, none revealed the existence of a feature coinciding with the appeal route.

#### *Aerial photographs 1946-2008*

12. Aerial photographs were also considered and I agree that the earlier photographs, whilst showing various routes within the woodland, do not show the appeal route. As regards the later examples, I consider it is difficult to draw any conclusions from the 1985 photograph, whilst that dated 1990 shows what could be parts of the appeal route, although dense tree cover limits what can be seen<sup>1</sup>. I would regard any that do show what could be parts of the appeal route as providing some evidence in support of the existence of a physical feature where visible, but they provide no evidence as to status.
13. I note that there are references to electricity company workers having cleared/cut vegetation beneath power lines along an alignment which appears to coincide with at least part of the appeal route. However, the documented evidence relating to this dates from 1994 after the 1990 photograph was taken, when the electricity company entered into an agreement with Mr Vukcevic who has an interest in part of the land affected by the appeal route.

#### *Correspondence 1988-1993*

14. A trail of correspondence between the Longbeech Park Residents Association ('the Residents Association') and the Council's Highways department concerns requests to establish a footway between Longbeech Park and the existing pavement at Charing Hill. A letter from the Council, dated 16 December 1987, suggests that what was being considered (but at the time rejected) was, due to the cost of construction, a metalled footway. A letter to Mr Mills at Longbeech Park dated 5 January 1990 concerning an evaluation carried out by the Council in October 1989 refers to the "footway scheme" presented to the Council's Highways Committee and to their footway programme - the evaluation having proved unsuccessful in this case.
15. On 6 July 1988, the Residents Association wrote of the "appalling state of the grass verge" that their residents and other local inhabitants had to use: the verge being so overgrown that users were "forced to walk in the road". They requested that the roadside verge be cut back and kept short. A similar request, together with levelling the "grass track" was made on 27 September 1989. The Council responded on 1 November to say that the landowners had been asked to cut back the hedges. It is evident from a letter dated 31 January 1992 from the Council to Mr Mills that this was done, but by then had grown again and a similar request was to be made to the landowner.
16. The Appellant refers to a letter dated 13 June 1990 from Charing Parish Council to the Council asking for the footway "to be formalised". I have been unable to find a copy of this document in the submissions, so I cannot establish whether or not the reference to a "footway" concerns the appeal route or the desired construction of a footway along the roadside verge. A letter dated 6 July 1990 from the Council to a Mrs Friday (referring to a letter of 13 June) refers to their "footway assessment programme". If it can be demonstrated that the Parish

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<sup>1</sup> A 2008 photograph which the Council concluded showed the majority of the Appeal route was not included in the Council's bundle

Council letter refers to the appeal route this could be evidence in favour of the Appellant's case, and would provide some support to claims that the appeal route existed on the ground before 1990 (paragraph 25 below).

17. By 1993 with no progress concerning the footway, Mr Ray wrote to the Council enclosing a petition and letters from local residents pointing out the need for a footway that would be used by 80% of the residents if it were there, the only option being when faced with heavy lorries passing on the road being to "dive into the hedge". The correspondence, though, makes no mention of an alternative, the appeal route. It clearly refers to the verge, and the cutting back of vegetation to allow its use, and the need for a footway alongside the carriageway. In addition, letters in support of the provision of a footway refer to being unable to access Charing other than by risking walking along the road. Indeed, one correspondent states that they do not walk to the village due to lack of a safe means to do so. The Appellant suggests this is not significant, as residents were seeking a tarmac path, which could be used by those with wheelchairs or mobility scooters, and they would have no reason to mention one behind the hedge that was sometimes muddy.
18. On the face of it, the correspondence provided to me does not support the case for the appeal route, and points away from the use or indeed existence of an alternative route on the other side of the hedge equivalent to the appeal route. However, some of the witness evidence appears to conflate the two issues. Mr Zeen, for example, refers to a meeting which he attended about the issue, and appears to describe the appeal route and the pavement the Council were considering putting down as one and the same. Nevertheless, the Council's responsibilities in this regard would have been confined to the boundaries of the public highway.
19. In or soon after 1993, following a request to the local County Council Member Mr King, some clearance work took place and road planings were laid along about 80% of the appeal route, by Mr Ray's estimation. Others refer to the muddy section being improved, or that it did not extend beyond the first track, or that all of it was improved.

#### *Summary*

20. The historical documentary sources provide no assistance as regards the existence or status of the appeal route. Aerial photographs are inconclusive, although the later ones show a feature coincident with parts of the appeal route. The correspondence available to me from the late 1980s/early 1990s shows a clear desire for a footway to link Longbeech Park with Charing Hill alongside the carriageway, which tends not to support the existence or use at this time of the appeal route. This conflicts with the claimed use of the appeal route which I consider next.

#### ***Claimed use by the public: Section 31 of the 1980 Act***

##### *Bringing into question*

21. A challenge to the public's use of the appeal route occurred at the end of 2011 when the owner of the property 'Sherwood' placed a wooden tripod arrangement on the path together with a separate notice stating that there was no public footpath, although permission may be granted if applied for in writing. Several users refer to this although most simply continued and walked around the obstacle. It was not until later in 2012 that a gate was put across

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the route at Sherwood and fencing put across the route in the woodland (which was leased), that the public were physically prevented from continuing.

22. The 20 year period for the purposes of Section 31 is calculated back from the date of bringing into question. Users were aware that their right to use the appeal route was being challenged at the end of 2011, and this gives a 20 year period of 1991 to 2011. This does not, however, mean that use first commenced at the beginning of the 20 year period. If, however, 2012 is taken as the date of bringing into question, then this would have implications as regards whether any landowner demonstrated a lack of intention to dedicate within the period due to the notices in 2011 expressing a contrary intention.

*Evidence of use*

23. Evidence of claimed use is provided by some 28 witnesses and correspondence from 3 new witnesses is included in the Appellant's submission<sup>2</sup>. Use is claimed throughout the 20 year period identified with varying degrees of frequency. However, both the Council and Appellant agree that claimed use increases after 1993, coinciding both with when the path's surface had been improved, and when some of the claimants moved to the area and began to use the path.
24. Whilst there is sufficient user evidence to raise a presumption of dedication after 1993, the question arises as to use before then. Between 1991 and 1993 use is claimed by 8 individuals<sup>3</sup>. The form completed by D Moody provides very little detail and also indicates use was permissive. Occasional use is claimed. Overall, the weight that can be attached to this evidence is limited. The remaining 7 witnesses were interviewed by the Council providing greater detail and clarification. Accordingly more weight can be attached to their evidence. Claimed use of the appeal route itself varied and included 5 times a week, 2 to 3 times a week, weekly and half a dozen times a year. I would regard this as relatively low frequency of use. Nevertheless, it demonstrates continuous use throughout the 20 year period.
25. In addition is the written evidence of Mr Wheaton that the appeal route existed and was in use during this period. Additional evidence provided by the Appellant in the Appeal papers includes comment from R Keyse that they had observed use of the appeal route on a daily basis between 1968 and 2002; from Mrs Thorogood that she had used it from 1984 to 2000; and from Mrs Kent that she and her family had used it for over 30 years. The evidence of these 3 witnesses as it stands lacks detail and attracts little weight, but may provide further support in favour of the Appellant's case, if clarified.
26. However, I do not agree with the Appellant that because residents of Longbeech claimed use of the appeal route from the time they moved in, that it can be assumed their predecessors did likewise. There would need to be evidence of this rather than speculation or hearsay.
27. There are, though, some discrepancies in the user evidence about the eastern end of the appeal route. The Appellant does not regard any alteration of the route here as significant. However, some users did not enter the path adjacent to Sherwood, but at a point further west along the road, almost opposite the entrance to Honeysuckle House. It is this last 20 metres or so of the path

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<sup>2</sup> Additional correspondence is provided from people who had previously provided evidence

<sup>3</sup> Mr and Mrs Butler, Mr and Mrs Greengrow, D Moody, Mr Ray, Mr Reed and Mr Zeen.

heading east towards Sherwood that Mr Ray acknowledged as where the "majority" of users stepped out onto the verge rather than follow the uneven path which was difficult for some to use. It also seems that this section was widened and levelled out by the landowner shortly before the path was fenced off: Mr Ray's evidence in 2013 was that this was about 5 years ago which would place it around 2008. It may be that more than one route was used here, although there remains evidence that some users were following the appeal route here throughout the 20 year period. This includes use by Mrs Butler, Mr Ray, Mr Reed and Mr Zeen during the early years, by reference to the maps attached to their forms.

28. The Council comments that the appeal route must be capable of dedication and ought properly to lead to another highway, a recognised viewpoint or place of public resort. Here its destination is a private access track, and it is therefore a cul-de-sac. In most cases a public right of way will commence and terminate on another public right of way of equal or greater status. However, there is no rule of law that a cul-de-sac right of way cannot exist. Further, it is unclear whether users were walking on the highway verge between Longbeech Park and the west of Sherwood, or on land owned by the properties they were passing. This could affect the termination point of the appeal route at its eastern end.
29. Several claimants indicate that they had permission to use the appeal route. This is clarified by some stating the owner of Sherwood gave permission to the residents of Longbeech shortly before he closed it. Whether this was before or after the notices went up in 2011 is not clear. If it was before, then the granting of permission to use the appeal route could have implications for the 20 year period and whether or not use by the public was as of right: that is without force, secrecy or permission. Some claimants also said they had permission to walk south along the first track encountered heading west from Longbeech Park, but this does not form part of the appeal route.

#### *Landowner evidence*

30. The Council's Report into the Application concluded there was sufficient evidence that there was a lack of intention to dedicate the appeal route on behalf of the landowners and occupiers. However, the Appellant questions the conclusions reached.
31. There are reports from witnesses that the appeal route was overgrown at times. Prior to 1993, one witness described it as "overgrown and you had to fight your way through". However, others said of the same period that it was wide enough for one person to walk and that it was never so overgrown that it could not be used. The evidence from users for this period is thus conflicting. Over the years local residents, users, and one of the occupiers took it on themselves to cut back or mow parts of it: Mr Wheaton indicated that he did this before the path was surfaced. The Council or District Council it is said may also have carried out occasional maintenance. There is no evidence in the submissions to indicate that any of the landowners objected to the work that was carried out by local people or by the Council. Therefore evidence that the landowners allowed the appeal route to become overgrown as an expression of a lack of intention to dedicate is, I consider, weak.
32. There is nothing to suggest that the electricity company was acting on behalf of the landowner(s) in expressing a lack of intention to dedicate the appeal route, when they stopped public use whilst they carried out clearance work. Whilst

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- this may constitute an interruption to use, it was temporary, and more likely than not a health and safety requirement than intended to prevent use by the public.
33. Accordingly, on the basis of these issues I consider that there is insufficient evidence of a lack of intention to dedicate the appeal route during the period 1991 to 2011.
34. There is a lack of clarity regarding who was contacted about the laying of material on the appeal route. Some form of agreement may have been made with either the landowners or the occupiers of the land, or perhaps both. There is no evidence of a formal agreement, and one lessee, Mr Wheaton, recalls agreeing to the surfacing, whilst another, landowner Mr Vukcevic, had no such recollection, and the Council reports he would not have agreed. This may indicate that permission was given by the landowners/occupiers for the 'formalising' of the path in this way; or that agreeing for it to be surfaced amounted to an act of dedication, or acquiescence in its use by the public. If it amounted to permission then use by the public would not have been as of right. There is no evidence that users were made aware that their use of the appeal route was permissive on the basis of the path having been surfaced. And there is no evidence as to how the request was framed to the landowners, nor of any details of any terms of any agreement.
35. Mr Wheaton who leases land towards the western end of the appeal route states that the path was evident on the ground in late 1989 and in 1990 when he took over the land. Similarly, Mr Ray at Robin Hood Cottage recalls that the path was evident when he purchased his property in 1988. Both believe that it was used well before then, perhaps as far back as the Second World War, but this is hearsay evidence. By contrast, Mr Vukcevic, whose interest is in land in the middle part of the route, says the appeal route was impassable in 1991 and for some years after until the electricity company cleared part of it. The evidence is conflicting.

#### *Summary*

36. There are inconsistencies and conflicts in the evidence. There are conflicting recollections as to whether or not the appeal route existed as a feature on the ground in the early 1990s. There is user throughout the 20 year period, although in the early years (before it was surfaced) it is relatively low in volume and frequency, and there are some inconsistencies in the alignment which reduces the overall weight of evidence. There is conflicting evidence that permission was sought from and given by the landowners to lay a surface on part of the appeal route. There is reference to permission granted by one landowner to residents of Longbeech Park, but not when this was given. There is evidence that another landowner encouraged use by keeping the path open.

#### ***Conclusions on the evidence as a whole***

37. I consider the appeal is finely balanced. However, and having regard to *Emery* (paragraph 5), in my view there is just sufficient credible evidence of actual enjoyment of the appeal route, albeit the volume and frequency of user is low in the early years. However, there are many conflicts in the evidence and these are such that they cannot be resolved from the written submissions. There is no incontrovertible documentary or other evidence that the way cannot be reasonably alleged to subsist. It follows that test B (paragraph 4) is met.

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## **Overall Conclusion**

38. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

## **Formal Decision**

39. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Kent County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Kent County Council to add a public footpath from Longbeech Park to 2 Tree Tops, Canterbury Road, Charing as proposed in the application dated 28 September 2012. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

*S Doran*

**Inspector**